

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY BERNARD IVEY,

Defendant-Appellant.

UNPUBLISHED

August 1, 2000

No. 216175

Saginaw Circuit Court

LC No. 97-014130 FH

Before: Gage, P.J., and Gribbs and Sawyer, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of possession with intent to deliver under fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant to three to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in failing to suppress cocaine evidence because the police sergeant who detained defendant and discovered the cocaine had no reasonable and articulable suspicion that criminal activity was afoot. We review de novo the trial court's ultimate decision on a motion to suppress, while we review for clear error the trial court's factual findings regarding the motion to suppress. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999).

It is well established that brief investigative stops short of arrest are permitted where police officers have a reasonable suspicion of ongoing criminal activity. *People v Christie (On Remand)*, 206 Mich App 304, 308; 520 NW2d 647 (1994).

A valid investigatory stop must be justified at its inception and must be reasonably related in scope to the circumstances that justified interference by the police with a person's security. Justification must be based on an objective manifestation that the person stopped was or was about to be engaged in criminal activity as judged by those versed in the field of law enforcement when viewed under the totality of the circumstances. The detaining officer must have had a particularized and objective basis

for the suspicion of criminal activity. [*People v Champion*, 452 Mich 92, 98-99; 549 NW2d 849 (1996).]

A vehicle stop for investigatory purposes may be based on fewer foundational facts than those necessary to support a finding of reasonableness where the police conduct both a stop and search. *Christie, supra* at 309.

By the time of the instant investigatory stop, the sergeant had observed a vehicle driven by defendant illegally parked, observed defendant after exiting the vehicle ignore the sergeant's order to move the vehicle and instead walk away and into a residence, and shortly thereafter observed defendant's vehicle attempt to back into the street when the sergeant approached. See *People v Shields*, 200 Mich App 554, 557-558; 504 NW2d 711 (1993) (Flight at police approach is a factor to be considered in determining whether reasonable suspicion supported an investigative stop.). The sergeant explained that he became suspicious because in his experience people normally did not ignore police orders to move their illegally parked vehicles. *People v LoCicero (After Remand)*, 453 Mich 496, 502; 556 NW2d 498 (1996) (noting that due weight must be given to the inferences a police officer draws from the available facts in light of his experience). Given these circumstances and their significance in light of the sergeant's experience, we conclude that the sergeant possessed a sufficient, particularized and objective basis for suspecting criminal activity and stopping the vehicle. *Champion, supra; Christie, supra*.

Because the sergeant possessed reasonable suspicion warranting his investigatory stop of the vehicle, the sergeant had authority to "perform a limited patdown search for weapons if the officer ha[d] reasonable suspicion that the individual stopped for questioning [wa]s armed and thus pose[d] a danger to the officer." *Champion, supra* at 99. We need not consider whether the sergeant's discovery of cocaine within defendant's jacket pocket falls within the limited scope of the sergeant's authority to frisk defendant, however, because defendant himself authorized the sergeant's search of defendant's person.

The consent exception to the warrant requirement permits a search when consent is unequivocal, specific and freely and intelligently given. The validity of the consent depends on the totality of the circumstances. *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998). Despite defendant's assertion that he did not voluntarily consent to any search, the trial court expressly credited the sergeant's recollections that defendant unequivocally agreed to let the sergeant search his person and that no force or coercion rendered defendant's consent involuntary. See *People v Acoff*, 220 Mich App 396, 400; 559 NW2d 103 (1996) (noting that investigative stops are not inherently coercive in nature). According to the sergeant, he did not handcuff defendant and defendant fully cooperated with him, never indicating any reluctance. Because we will not second guess on appeal the credibility determination central to the trial court's consent ruling, we conclude that the sergeant lawfully searched defendant's jacket pocket pursuant to defendant's knowing and voluntary consent. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999); *Marsack, supra*.

Defendant next claims that the admission of improper drug profile evidence deprived him of a fair trial, and that defense counsel's failure to object to this testimony constituted ineffective assistance of counsel. Because defendant did not object at trial to the introduction of the drug profile evidence, this

issue is unpreserved for appeal. To warrant reversal of defendant's conviction, defendant must establish that the unpreserved error affected his substantial rights, specifically that defendant was actually innocent or that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Even assuming arguendo that some of the drug profile testimony represented improper, substantive evidence of defendant's guilt, *People v Murray*, 234 Mich App 46, 52-58; 593 NW2d 690 (1999), defendant has not shown a plain error affecting his substantial rights. In light of the other direct evidence produced at trial showing that the police search of defendant revealed a pager, nearly \$2000, mostly in \$10 and \$20 denominations, and two large and uncut rocks of crack, we cannot conclude that defendant is actually innocent of the charged crime, or that any error seriously affected the fairness, integrity or public reputation of the instant judicial proceedings. *Carines*, *supra*.

Similarly we cannot conclude that defendant was denied the effective assistance of counsel. Even assuming that defense counsel's failure to object to the drug profile evidence fell below an objective standard of reasonableness, in light of the above evidence we cannot conclude that any error by counsel affected the outcome of defendant's trial. *People v Pickens*, 446 Mich 298, 303, 312; 521 NW2d 797 (1994).¹

Defendant next argues that several instances of prosecutorial misconduct denied him a fair trial. This Court determines prosecutorial misconduct issues on a case by case basis, examining the relevant record to conclude whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999).

Defendant's first claim of prosecutorial misconduct concerns the prosecutor's comments during closing argument that the jury should decide whether to believe defendant or the arresting sergeant and return a verdict consistent with that determination. While defendant suggests that these statements somehow impermissibly shifted the burden of proof to defendant, the prosecutor's argument focused on the credibility issue involved in this case and properly pointed out that because defendant's and the sergeant's testimony could not be reconciled, one of them was lying. See *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995) ("Arguments regarding the weight and credibility of the witnesses and evidence presented by defendant do not shift the burden to the defendant to prove his innocence, but rather question the reliability of the testimony and evidence presented.").

Defendant next argues that on two separate occasions during closing argument the prosecutor argued facts not in evidence. Because defendant did not object, however, to the first alleged error, specifically the prosecutor's statements that "the defendant came over. He used the phone. Did somebody page him, want to buy some more drugs? Don't know," he has waived this claim for review because an appropriate instruction would have cured any prejudice. *People v Avant*, 235 Mich App

¹ Because we do not find that the admission of the drug profile testimony deprived defendant of a fair trial, we reject defendant's further suggestion that the prosecutor engaged in misconduct in eliciting the drug profile testimony. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999).

499, 512; 597 NW2d 864 (1999). Concerning defendant's second allegation of error, the prosecutor's suggestion during his rebuttal argument that defendant's companion fled from the scene in an attempt to deflect the sergeant's attention from defendant, this argument constituted a reasonable inference from the evidence that related to the prosecutor's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Moreover, the trial court instructed the jury after the parties' closing arguments that the attorneys' statements are not evidence. *People v Solak*, 146 Mich App 659, 677-679; 382 NW2d 495 (1985). Accordingly, we conclude that any purported error did not render defendant's trial unfair.

Defendant further argues that during closing argument the prosecutor improperly denigrated the defense and defense counsel. Having reviewed the record, we find that the prosecutor's remarks when viewed in context did not deny defendant a fair trial, but represented proper argument, based on the evidence, that the defense theory that the sergeant planted drugs on defendant was unbelievable. *People v Marji*, 180 Mich App 525, 540-541; 447 NW2d 835 (1989); *People v Pawelczak*, 125 Mich App 231, 238; 336 NW2d 453 (1983). Moreover, we again note that the trial court instructed the jury that the attorneys' comments and arguments were not evidence.

To the extent that defendant raises several other instances of alleged prosecutorial misconduct, defendant did not timely object to the prosecutor's remarks. Having reviewed each of these alleged instances of misconduct, we conclude that either the prosecutor's comments were proper² or any prejudice to defendant could have been cured by an appropriate instruction, and that therefore defendant was not denied his right to a fair trial. *Avant, supra*.

Affirmed.

/s/ Hilda R. Gage
/s/ Roman S. Gribbs
/s/ David H. Sawyer

² We note that with respect to defendant's assertion that the prosecutor introduced bad acts evidence (a) concerning defendant's child support payments and (b) that defendant drove with a suspended license, (a) this inquiry at worst constituted a minor misstep and (b) defendant himself volunteered this information during his direct examination. *People v Griffin*, 235 Mich App 27, 45-46; 597 NW2d 176 (1999). While defendant alleges that the prosecutor improperly vouched for the sergeant's credibility, no indication exists that the prosecutor expressed some special knowledge concerning the sergeant's credibility. *Bahoda, supra* at 276. Lastly, while defendant challenges the prosecutor's argument that defendant lied during his trial testimony, the prosecutor's argument was not improper because the evidence showed that during the sergeant's investigatory stop defendant lied to the sergeant. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Wright*, 58 Mich App 735, 746; 228 NW2d 807 (1975).